No. 11075

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

WESTERN LOAN AND BUILDING COMPANY,
a corporation,
Appellant,

vs.

ALBERT C. ARTHUR AND H. B. ESTES,
Appellees.

APPELLEES' REPLY BRIEF

Fred. A. Wilson,
Attorney at Law,
408 Andreson Bldg.
San Bernardino, California.
Attorney for Appellees.

SUBJECT INDEX

TABLE OF CASES

STATUTES

TEXTBOOKS

No. 11075

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

WESTERN LOAN AND BUILDING COMPANY,
a corporation,
Appellant,

vs.

ALBERT C. ARTHUR AND H. B. ESTES,
Appellees.

APPELLEES' REPLY BRIEF

STATEMENT OF FACTS

Appellees instituted this action to recover the sum of $4,337.50 deposited with Appellant pursuant to the provisions of a written offer to purchase an apartment house and its furnishings.

Pursuant to its findings, the Trial Court rendered judgment in favor of Appellees.

Its motion for a new trial having been denied, Appellant has appealed from the judgment and order.

The essential facts, in chronological order, are:

April 1st, 1944, Appellees executed the offer (Exhs. 1 and 6; R. 51 and 69);

NOTE: Transcript references of a single figure denote pages; of two figures ,separated by a hyphen, denote page and line respectively. Italicized portions of quotations are not italicized in the originals, unless expressly noted.

April 25th, 1944, an inventory of the furnishings was taken (R. 149 and 150);

May 8th, 1944, two telegrams and two letters were sent by Appellees revoking the offer (R. 53 to 56);

May 9th, 1944, 4:13 A. M., one telegram was received at Salt Lake City, and later that morning delivered to the Salt Lake office of Appellant (R. 104 and 105);

May 9th, 1944, 9:21 A. M., the other telegram was transmitted by telephone to the Los Angeles office of Appellant (R. 106);

May 9th, 1944, 1:40 P. M., a telegram was sent by Appellant from its Salt Lake office in answer to the telegram of Appellees (Exh. G; R. 179 and 180);

May 9th, 1944, 4 P. M., Appellant placed its conveyances and other documents in escrow with the title company (R. 200);

May 10th, 1944, Appellees received a letter that the conveyances and other documents had been placed in escrow (Exh. H; R. 182).

Errors in the Statement of Facts of Appellant, either at variance with the foregoing essential facts, or at variance with other material facts, will be noted in the ensuing argument.

I.

THE INSTRUMENT CONSTITUTED AN OFFER; THE DEPOSIT CONSTITUTED FORFEIT MONEY

In the Opening Brief (p. 1), Appellant states that

this action is brought to recover a "*deposit* delivered by said plaintiffs to said defendant on an *agreement* to purchase an apartment house".

In its Amended Answer (R. 20), Appellant admits that "plaintiffs demanded the sum of $4,337.50", and alleges that such demand was made in connection "with the request by plaintiffs of the return to them of said sum previously paid by them and accepted by defendant as a deposit and *part payment* on the purchase price . . . . . ".

(1) *The instrument constituted an offer, not an agreement.*

The instrument (Exh. 6; R. 69) is designated "Offer to Purchase". It recites (R. 70) that "this offer shall remain open and irrevocable to and including May 1st, 1944".

This "offer" could not become the basis for an *agreement* until accepted.

(2) *The deposit constituted forfeit money, not part payment on the purchase price.*

The instrument recites (R. 70):

> "To cover such, a deposit, as stated below is agreed upon and settled as to the amount required reasonably to indemnify Owner and as liquidated damage to be retained by it if after acceptance hereof this sale is not completed by reason of any fault or failure of mine, or if this offer is withdrawn prior to May 1st, 1944."

The *deposit* was delivered to defendant "to indemnify Owner and as liquidated damage to be retained by it" *only*:

(a) If, *after* acceptance, the sale is not completed;

(b) If the offer is *withdrawn* prior to May 1st.

The deposit was not delivered as part payment on the purchase price. It could not be, since the purchase price had not been agreed upon. Title did not pass. There was no intention that title should pass. The defendant held the deposit as a stakeholder merely, subject to disposition upon the happening of one of the two contingencies specified. Before title could pass, Appellant was required to establish that the offer had been "accepted" (an act to be performed by defendant), or that the offer had been "withdrawn" prior to May 1st (an act to be performed by plaintiffs).

(3) *Appellees were not in the position of vendees.*

Since the instrument was a mere offer, not an agreement, the relation of vendor and vendee was never created. That relation cannot arise until one (the vendee) has agreed to purchase and the other (the vendor) has agreed to sell. The cases of Laffey v. Kaufman, 134 Cal. 391 (66 Pac. 494) and Walbridge v. Richards, 212 Cal. 408 (298 Pac. 985), cited by Appellant (Op. Br. pp. 14 and 15) apply the general rule that a vendee who has paid all or a part of the purchase price may not, in the event the vendor is able and willing to perform, recover the money so paid. In such cases the title to the money has passed to the vendor. Such is the necessary result of the *agreement*, whether oral or written. This rule does not apply, however, where the title to the money has not passed. Where, as here, the money is delivered to a stakeholder, title does not pass until the happening of the contingency agreed upon.

II.

THE EVIDENCE SUSTAINS THE FINDING THAT THE OFFER WAS NOT ACCEPTED

The complaint alleges a cause of action for money had and received (R. 2).

The amended answer pleaded affirmatively that "on or about April 24, 1944 and while said offer remained open defendant verbally accepted said offer to purchase" (R. 21).

The Court found that the offer was revoked on May 8th, that Appellant on May 9th received notice of such revocation, and that (R. 26):

> "the defendant did not, prior to receiving notice and obtaining knowledge of plaintiffs' withdrawal and revocation, accept said offer".

The Court also found (R. 26):

> "(1) That it is not true that on or about April 28th, 1944, or at any other time while said offer remained open, the defendant verbally or otherwise accepted said offer, or agreed to sell or did sell to plaintiffs the said Apartments, or any property whatsoever."

Appellant fails to indicate wherein the evidence is insufficient to sustain these findings. The findings are necessarily in the negative, viz., that the defendant did not accept the offer. Appellant fails to point out wherein the evidence establishes the affirmative, viz., that it did accept it. Yet the burden was upon Appellant to establish the affirmative by a preponderance of the evidence.

(a) *Acceptance by a corporation can only be made by an agent or officer having authority so to do.*

The rule is thus stated (6a Cal. Jur. Sec. 653):

> "To prove a contract claimed to be binding on a corporation, it should be shown that the agreement was made on the corporation's behalf by someone who had authority to act for it."

In Mariposa Commercial etc. Co. v. Peters, 215 Cal. 134, (8 Pac. 2d 849) the corporation executed a lease of real property with an option to purchase. The lessee attempted to establish a modification by letters and telegrams between himself and the president of the corporation. The Court said (140):

> "For still another reason we are of the opinion that the modifying agreement was not binding on respondent. The lease and option were in the name of and executed by the respondent under its corporate seal. The modifying agreement was entered into by Benjamin, who was president of respondent corporation. As far as the record is concerned Benjamin was *without authority* to thus modify the contract of the corporation in reference to real property. The *burden* was upon Fremont Grant, Inc., to prove the allegations of the cross-complaint in reference to this modifying agreement, and to *prove*, if it desired the affirmative relief of specific performance, the *authority* of Benjamin to thus bind respondent corporation. Having failed to do so the modifying agreement cannot be held to be binding on the corporation. (Black v. Harrison Home Co., 155 Cal. 121 (99) Pac. 494); 6a Cal. Jur. 1146, sec. 653; 6a Cal. Jur.

1138, sec. 648; 6a Cal. Jur. 1153, sec. 644.) It therefore follows that the findings to the effect that no modifying agreement binding on the respondent had been entered into, and denying specific performance of such agreement, are amply supported by the evidence."

In Black v. Harrison Home Company, 155 Cal. 121 (99 Pac. 494) an action was brought by the vendee to enforce a contract in writing for the sale of real property executed in the name of the corporation by its president. The Court said (126):

"It is an elementary principle of corporation law that the president of a corporation has no power merely because he is president to bind the corporation by contract. The management of the affairs of a corporation is ordinarily in the hands of its board of directors, and the president has only such power as has been given him by the by-laws and by the board of directors, and such other power as may arise from his having assumed and exercised the power in the past with the apparent consent and acquiescence of the corporation. The general rule in this regard is stated in 2 Cook on Corporations, section 716, as follows: 'The president of a corporation has no power to buy, sell, or contract for the corporation, nor to control its property, funds or management. This is a rule which prevails everywhere, excepting possibly in the state of Illinois . . . It is true that the board of directors may expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power

in the past; or the corporation may ratify his contract or accept the benefits of it, and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other one director.' (See Alta Silver Min. Co. v. Alta Placer Min. Co., 78 Cal. 629, 632, (21 Pac. 373); Bliss v. Kaweah etc. Co., 65 Cal. 502, (4 Pac. 507); Salfield v. Sutter etc. Co., 94 Cal. 546, (29 Pac. 1105); Blood v. La Serena etc. Co., 113 Cal. 221, (41 Pac. 1017, 45 Pac. 252); Barney v. Pfoor, 117 Cal. 56, 58, (48 Pac. 987); Northwestern etc. Co. v. Whitney, 5 Cal. App. 105, 108, (89 Pac. 981).)"

In Daum v. Weber Showcase etc. Co., 103 Cal. App. 74, (283 Pac. 957) an action was brought upon a broker's contract in writing for the sale of real property executed in the name of the corporation. The judgment in favor of the corporation was affirmed, the Court saying (76):

"At the time of the execution of said agreement there was no written agreement, memorandum or minutes of the corporation *authorizing* Fred Weber to execute said agreement or to sign the name of the corporation, Weber Showcase & Fixture Company, thereto (sec. 2309, Civ. Code), and a corporation can confer authority upon an agent for that purpose only through its board of directors acting as such by resolution duly passed and recorded, and a ratification of such an act by an agent can be made only in like manner. (Salfield v. Sutter etc. Land Co., 94 Cal. 546 (29 Pac. 1105).)

> "It appearing that the power and authority to be conferred by the agreement falls within the inhibitions of section 1624 of the Civil Code, and section 2309 of the Civil Code, plaintiff cannot maintain his position, and the judgment is affirmed."

In Scott v. Los Angeles Mountain Park Company, 92 Cal. App. 258, (267 Pac. 914) an action was brought by the vendee to recover damages for breach of a contract in writing for the sale of real property executed in the name of the corporation by one of its directors. The judgment of nonsuit was affirmed upon the ground that the authority of the director was not established.

In Peasley v. Producers Market Co., Inc., 86 Cal. App. 577, (261 Pac. 733) an action was brought on a written lease executed in the name of the corporation by its president. Judgment in favor of the corporation was affirmed, the Court holding that the authority of the president was not established.

(b) *Appellant failed to establish authority in any agent or officer.*

No evidence was offered which identified the agent or officer vested with authority to accept the offer. The offer does not identify such agent or officer. It merely recites (R. 70):

> "that upon receipt of this offer and pending approval and closing that other sales may be lost to the Owner, Western Loan and Building Company, that the Owner will at once commence investigation hereon and cause appraisals to be made and an examination by its Executive Committee to be had . . . . ".

The prospectus (Exh. 5, R. 63) does state (R. 64):

> "All offers are subject to approval by the Executive Committee of Western Loan and Building Company."

But it does not state that the "approval" by this Committee constitutes an acceptance. Such an approval may be merely a prerequisite to acceptance — merely one step in the corporate procedure prescribed in perfecting an acceptance.

Neither Carron nor Sullivan, the only two witnesses produced by Appellant, had authority to accept. So much was conceded. Carron testified that he did not have "authority to accept the deal" (R. 127).

Sullivan testified that C. J. Sumner was his (R. 185) "final executive authority on all sales", from whom he received "authority . . . to proceed with the closing of the sale" (R. 201).

Arthur testified (R. 231) that Carron and Sullivan stated that "neither of them had the power to make any kind of a deal" . . . "They themselves could not give us any kind of an answer".

There is no conflict in the record. The acceptance could only be made in the Salt Lake office. But by whom? The record does not reveal his or their identity.

(c) *Appellant failed to establish acceptance by an officer or agent so authorized.*

Acceptance is a legal act. It must be performed by one having contractual capacity—the power to contract. It embraces two elements, viz:

(1) The consent, and

(2) The communication of that consent.

Section 1565 of the Civil Code of California provides:

> "Essentials of consent. The consent of the parties to a contract must be:
>
> 1. Free;
> 2. Mutual; and,
> 3. Communicated by each to the other."

Sections 1581 and 1582 of said Code provide:

> "Communication of consent. Consent can be communicated with effect, only by some act or omission of the party contracting, by which he intends to communicate it, or which necessarily tends to such communication."
>
> "Mode of communicating acceptance of proposal. If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted."

The offer in question does not prescribe any "conditions concerning the communication of its acceptance". Therefore, appellant would have been well within its rights had it adopted "any reasonable and usual mode" for the communication of its acceptance. But there is no evidence that anyone, having the authority so to do, effected the "consent" of appellant — made the decision on its behalf. Nor is there any evidence that any officer or agent, so authorized, "communicated" to Appellees its consent in any "reasonable and usual mode".

If the Executive Committee charged as it was with

duty of "approval" was also authorized to "consent" to the offer — to accept it, there is no evidence that it did so. Neither is there any evidence that this "Committee" ever communicated such acceptance to Appellees.

If Sumner was authorized to consent, and to communicate such consent, there is no evidence that he did either.

The only evidence relied upon to establish consent, and communication of it, consists of a purported telephone conversation on April 24th, 1944, between Carron and Arthur, and a purported conversation on May 8th or 9th between Sullivan and Arthur.

(d) *The purported telephone conversation of April 24th, 1944, was not an acceptance.*

Appellant pleaded (R. 21):

> "that on or about April 24, 1944 and while said offer remained open defendant verbally accepted said offer to purchase . . . . ".

As already noted, the Court found this allegation to be untrue (R. 26).

Carron testified, over objections of Appellees, that on April 24th he called Arthur by telephone, at which time the following conversation took place (R. 147):

> "A. When he answered the 'phone I said, "Hello. Art?'
> He said, 'Yes.'
> And then I said, 'Congratulations.'
> And he said, 'For what?'
> And I said, 'Because you are the new owner of the Norman Manor and Annex Apartments on E Street.'

Then his next remark was, 'So they accepted the deal, Herb?'

And I said, 'Yes, they have accepted the deal.'
Then he said, 'What do we do now?'
I said, 'Well, the next step is for me to go and take an inventory of the company-owned property.'
And he said, 'When will you be out?'
I said, 'Oh, in the next day or so; perhaps tomorrow.'

(100) Then I asked him if he would make a reservation for me at the California Hotel, that I would be out the next day, April 25th, and I arranged to meet him, as I recall, at his jewelry store at about noon."

Arthur denied the conversation, insofar as it related to the statement that "they have accepted the deal." He testified (R. 115):

"The Court: Did you ever receive any written communication from the Western Loan & Building or Mr. Carron or Mr. Sullivan on or before May 1, 1944, that they had accepted or rejected the offer contained in Exhibit 1 and Exhibit 6?

The Witness: No, sir.

Mr. Mulliner: Your Honor—

The Court: Well, I will strike it if you wish.
Mr. Mulliner: Of course, it is our position, if your Honor will permit me, that this does not depend on a written communication of acceptance.
The Court: I just asked if he had received one. You can develop any other kind of communication. I was going to ask him the same question I asked of Mr. Estes.

Did you receive any oral communication from Mr. Carron or Mr. Sullivan or any other person representing or claiming that they represented the Western Building and Loan on or before May 1, 1944, advising you that your offer was accepted?
The Witness: No, sir.

Mr. Wilson: That is the Western Loan & Building Company, your Honor.

The Court: Whatever it is. You knew who I meant, didn't you.

The Witness: Yes, sir. (62)

The Court: All right."

Arthur also testified (R. 227):

" 'A Oh, the day of the telephone conversation we just talked about the preparation for the inventory.'

You so testified, did you not? A Yes, sir.

Q (Reading):

'Q And on that occasion Mr. Carron did not state to you that Salt Lake had accepted the offer?

"A I asked him if Salt Lake had accepted the offer and he said we would have to take an inventory first and send it to Salt Lake.' "

Estes testified that up to May 1st, 1944, he had not been advised by anyone that the "deal had been accepted." He testified (R. 92):

"The Court: Did you ever receive any communication in writing from the Western Building & Loan or Mr. Sullivan or Mr. Varron before May 1, 1944, that the Western Building & Loan had accepted your offer?

A. Before May 1st? What date does that offer of

purchase have?
The Court: This Exhibit 6 and Exhibit 1 are—the testimony has been that they were written may 1st—

Mr. Wilson: April 1st.

The Court: April 1, 1944.
The Witness: No, sir, I never received anything in writing from them that the deal had been accepted.
The Court: At any time?
The Witness: No, sir.
The Court: Did you ever receive any other information that the deal had been accepted on or before May 1, 1944, from either one of the two gentlemen mentioned or anyone else representing or pretending to represent the Western Building & Loan?
The Witness: No, sir.
The Court: You did not? (33)
The Witness: No, sir.
The Court: All right."

Since the evidence is conflicting, the finding is conclusive. "Findings of Fact shall not be set aside unless clearly erroneous" (Rule 52 (a)).

So far as a finding "depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable" (Wittmayer v. U. S., C. C. A. 9th, 118 Fed. 2d. 808-811).

But even if there had been no conflict in the evidence, Carron's version of the conversation of April 24th was not an acceptance. The acceptance, and communication thereof, must come from one having authority.

There is no evidence that Carron had authority either to "consent" on behalf of the corporation, or to "communicate" consent on its behalf.

(e) *The purported conversation of May 8th or May 9th was not an acceptance.*

As already noted, the only acceptance pleaded was a verbal acceptance "on or about April 24th, 1944".

In the telegram of May 9th from the Salt Lake office (Exh. G, R. 180), the only acceptance referred to was one "prior to May 1st". Yet Appellant now asserts (Op. Br. 43) that the offer was accepted on May 8th, 1944. This refers to a purported telephone conversation between Sullivan and Arthur. Sullivan's version was as follows (R. 157):

"A. I said, Hello, Mr. Arthur.'
And he said 'Yes.'
I said, 'This is Mr. Sullivan at Western Loan & Building Company.'
He said, 'Yes.'
I said, 'I have the papers here and am ready to close the sale.'
He then replied, 'We are not going through with the sale. Didn't you know?'

However, on cross-examination he testified (R. 200):

"Q. By Mr. Wilson: You stated yesterday, I believe, that at some time on May 8th or May 9th, 1944, you got hold of Mr. Arthur on the telephone?
A. That is correct, May 8th.
Q. May 8th? And at that time Mr. Arthur said to you, didn't you know that he was not going through with the deal? A. Yes, he did.
Q. Didn't he tell you that a telegram had been

sent to you so informing you? A. Yes."

But the "telegram" referred to on this cross-examination was a night letter sent May 8th (Exh. 2, R. 53).

Arthur, however, fixed the date as May 9th. He testified (R. 116):

"Q. By Mr. Mulliner: Did you receive any oral communication that Western Loan & Building Company had accepted the proposition?

The Court: You mean at any time?

Mr. Mulliner: Yes.

A. I received a telephone call from Mr. Sullivan stating that—

The Court: When?

The Witness: On May 9th.

Q. By Mr. Mulliner: Was that the only communication that you received?

A. That is the only one relative to any acceptance of the deal.

Q. And you say that was after May 1st, and, in fact, May 9th- A. Yes, sir."

The version of Estes was as follows (R. 100):

"A. Yes, but that information, I think, came after we had wired them—after Mr. Wilson had wired them that we rejected the deal."

The Court found, as above noted, that it was not true that on about April 28th, "or at any other time . . . the defendant verbally or otherwise accepted said offer".

Here, again, since the evidence is in conflict, the finding, under the authorities above noted, is conclusive.

Furthermore, even if there were no conflict, Sullivan's version of the conversation was not an acceptance. There is no evidence that Sullivan had authority either to "consent" on behalf of the corporation, or to "communicate" consent on its behalf. Sullivan did not purport to transmit the decision of any officer or agent so authorized.

Acceptance cannot rest upon speculation or conjecture. The offerer is entitled to know, from an authoritative source, that the corporation has accepted the offer. Furthermore, this information must be transmitted by a "reasonable and usual mode". In this instance, since the authoritative source apparently was located in Salt Lake City, a "reasonable and usual mode" would have required a written communication (letter or telegram) from the officer or agent authorized by the corporation to consent on its behalf, and to communicate such consent. Certainly, telephone conversations by persons not so authorized do not constitute a "reasonable and usual mode".

(f) *The revocation extinguished the offer.*

The telegrams and letters of revocation were sent May 8th, and received both in the Los Angeles office and in the Salt Lake office on the morning of May 9th. Not until 4 P. M. on the 9th were escrow instructions and other documents executed by the corporation delivered to the title company, of which plaintiffs received written notice on May 10th. But as an acceptance and communication of "consent" these acts were too late. Acceptance after revocation is, of course, ineffectual.

Sec. 1586 of the California Civil Code provides:

> "A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards."

"It is elementary that an offer may be revoked at any time before acceptance, and this rule applies in cases where the offer states, as it does here, that it shall remain open for a designated period" (Grieve v. Mullaly, 211 Cal. 77, 79; 293 Pac. 619).

III.

THE COURT FOUND ON ALL MATERIAL ISSUES

As Point VIII (Op. Br. p. 46), Appellant contends that the Court should have found specifically upon two asserted "material issues", to-wit:

(a) Did Carron advise Arthur on April 24th, 1944, in a telephone conversation that Salt Lake had accepted?

(b) Did Sullivan advise Arthur on May 8th, 1944, in a telephone conversation that Salt Lake had accepted, and that he had all the closing papers; if so, was this telephone call before or after the receipt of any telegram or letter of revocation?

These inquiries relate to probative facts. The ultimate facts, viz., that the offer had not been accepted "verbally or otherwise" prior to revocation necessarily include a finding with respect to these probative facts. Where findings of ultimate facts carry by implication a determination of probative facts, specific findings with respect to probative facts are not required. (Brown Paper Mill Co. Inc. vs. Irwin, C. C. A. 8th, 134 Fed. 2d. 337; Gay Games Inc. vs. Smith, C. C. A.

7th, 132 Fed. 2d. 930; Klimiewicz vs. Westminster Deposit and Trust Company, C. C. A. D. C., 122 Fed. 2d. 957-8; McGee v. Nee, C. C. A. 8th, 113 Fed. 2d. 543.)

In McGee v. Nee, supra, the Court said:

"A trial court in making findings of fact is required to find only the ultimate facts".

Incidentally, the statement (Op. Br. p. 47) "that it had been recited in plaintiffs' Bill of Particulars that it was, 'a deposit to apply on the purchase price'" is not correct. The recital therein referred to (R. 13) is as follows:

> "said sum was so delivered by plaintiffs to defendant and was received by defendant, as aforesaid, as a deposit to apply on the purchase price of certain real (15) property *in the event a contract for the purchase thereof was entered into* between the plaintiffs and the said defendant."

The written offer does not so provide. The parties orally agreed, however, that if the property was purchased the deposit, instead of being returned, should be retained to apply on the down payment.

IV.

THE VALIDITY OF THE PROVISION FOR LIQUIDATED DAMAGES IS NOT AN ISSUE

As Point II (Op. Br. 17) Appellant contends that the provision for liquidated damages is valid.

But Appellant sought to retain the deposit upon the theory that the offer had been accepted. Obviously, if there was no acceptance, as the Trial Court found,

it could not be retained under any circumstances.

Furthermore, even if there had been an acceptance, Appellant, in order to retain the deposit as liquidated damages, was required to plead and prove facts "from which the court can say as a matter of law that the contract for liquidated damages is valid because from the nature of the case it would be impracticable or extremely difficult to fix the actual damage. The mere stipulations of the contract are insufficient for that purpose" (Robert Marsh & Co., Inc., v. Tremper, 210 Cal. 572, 576; 292 Pac. 950).

Such facts were not pleaded.

V.

WAIVER OF TIME LIMIT IS NOT AN ISSUE

As Point V (Op. Br. 28), Appellant contends that the time limit, to-wit: May 1st, was waived. Since the Court found that the offer was not accepted prior to revocation, the point is not an issue. Furthermore, if waiver was relied upon, it should have been pleaded (Wienke v. Smith, 179 Cal. 220, 225; 176 Pac. 42).

VI.

OTHER POINTS NOT IN ISSUE

In view of the finding that the offer was not accepted "verbally or otherwise" prior to revocation, it is obviously unnecessary to determine the other points raised in Appellant's Opening Brief, including:

Point I: Whether a verbal acceptance is sufficient.

Point III: Whether the offer was definite and certain;

Point IV: Whether the offer was to remain open until May 15th;

Point VI: Whether the inventory had any connection with Salt Lake's offer.

IN CONCLUSION

Inasmuch as the chief point raised upon appeal relates to acceptance, and the Court found that the offer was not accepted, "verbally or otherwise", prior to revocation, the judgment, it is submitted, under the authorities above noted, should be affirmed.

Respectfully submitted,

FRED. A. WILSON,
Attorney for Appellees.